but the *desirability* of that restriction on local regulatory power. And since it agreed with the interpretation but did not agree with the policy, the Senate Commerce Committee proposed an amendment to H. R. 10729, whose purpose, according to its Report, was to "give local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities." S. Rep. No. 92-970, supra, at 27. In a supplemental Report, the Senate Agriculture Committee opposed the Commerce Committee's amendment, which it said would "give local governments the authority to regulate the sale or use of a pesticide, " thereby "vitiating" the earlier Agriculture Committee Report. S. Rep. No. 92-838, pt. 2, supra, at 46-47. This legislative history clearly demonstrates, I think, not (as the [\*620] Court would have it) that the two principal Senate Committees disagreed about whether H. R. 10729 pre-empted local regulation, but that they were in complete accord that it *did*, and in disagreement over whether it *ought* to.

Of course that does not necessarily say anything about what Congress as a whole thought. Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here -- which is probably an unrealistic assumption -- and assuming further that they were in unanimous agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House. It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill -- assuming (we cannot be sure) that the Reports were available before the vote. Those pertinent portions, though they dominate our discussion today, constituted less than a quarter-page of the 82page House Agriculture Committee Report, and less than a half-page each of the 74-page Senate Agriculture Committee Report, the 46-page Senate Commerce Committee Report, and the 73-page Senate Agriculture Committee Supplemental Report. Those Reports in turn were a minuscule portion of the total number of reports that the Members of Congress were receiving (and presumably even writing) during the period in question. In the Senate, at least, there was a vote on an amendment (the Commerce Committee proposal) that would have changed the result of the supposed interpretation. But the full Senate could have rejected that either because a majority of its Members disagreed [\*\*2490] with the Commerce Committee's proposed policy; or because they disagreed with the Commerce Committee's and the Agriculture Committee's interpretation (and thus thought the amendment superfluous); or because they were blissfully ignorant of the entire dispute and simply thought that the Commerce [\*621] Committee, by [\*\*\*553] asking for recommittal and proposing 15 amendments, was being a troublemaker; or because three different minorities (enough to make a majority) had each of these respective reasons. We have no way of knowing; indeed, we have no way of knowing that they had any rational motive at all.

All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law. On the important question before us today, whether that law denies local communities throughout the Nation significant powers of self-protection, we should try to give the text its fair meaning, whatever various committees might have had to say -- thereby affirming the proposition that we are a Government of laws, not of committee reports. That is, at least, the way I prefer to proceed.

If I believed, however, that the meaning of a statute is to be determined by committee reports, I would have to conclude that a meaning opposite to our judgment has been commanded three times over -- not only by one committee in each House, but by *two* Committees in one of them. Today's decision reveals that, in their judicial application, Committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not. To my mind that is infinitely better than honestly giving them dispositive effect. But it would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all.

\* \* \*

The Court responds to this concurrence in a footnote, ante, at 610-612, n. 4, asserting that the legislative history is [\*622] really ambiguous. I leave it to the reader to judge. I must reply, however, to the Court's assertion that the "practice of utilizing legislative history reaches well into [our] past," ante, at 612, n. 4, for which proposition it cites an opinion written by none other than John Marshall himself, Wallace v. Parker, 6 Pet. 680 (1832). What the Court neglects to explain is that what it means by the "practice of utilizing legislative history" is not the practice of utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text -- which is the only practice I object to. Marshall used factual statements in the report of an Ohio legislative committee "as part of the record" in the case, id., at 689, 690, assuming that that was permissible "under the laws of Ohio," ibid. I do not object to such use. But that is quite different from the recent practice of relying upon legislative material to provide an authoritative interpretation of a statutory text. That would have shocked John Marshall. As late as 1897, we stated quite clearly that there is "a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 318, 41 Ed. 1007, 17 S. Ct. 540. And even [\*\*\*554] as late as 1953, the practice of using legislative history in that fashion was novel enough that Justice Jackson could dismiss it as a "psychoanalysis of Congress," and a "weird endeavor." <u>United States v. Public Utilities</u> Comm'n of Cal., 345 U.S. 295, 319, 97 L. Ed. 1020, 73 S. Ct. 706 (concurring opinion). It is, in short, almost entirely a phenomenon of this century -- and in its extensive use a very recent phenomenon. See, e. q., Carro & Brann, Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis, 9 J. Legis. 282 [\*\*2491] (1982); Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195. 196-197 (1983).

I am depressed if the Court is predicting that the use of legislative history for the purpose I have criticized "will ..., [\*623] reach well into the future." But if it is, and its prediction of the future is as accurate as its perception that it is continuing a "practice ... reaching well into [our] past," I may have nothing to fear.

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(Vor \*10

1995U.S. Dist. LEXIS 4798, \*

**CELLULAR DYNAMICS, INC., Plaintiff, v. MCI TELECOMMUNICATIONS CORPORATION,**Defendant.

Case No. 94 C 3126

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1995 U.S. Dist. LEXIS 4798

April 6, 1995, Decided April 12, 1995, DOCKETED

#### CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff telephone services reseller brought an action against defendant long distance carrier for damages following the carrier's cancellation of the planned transfer of the reseller's customers to the carrier. The reseller alleged breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq. (1993). The carrier filed a Fed. Rule Civ. P. 12(b) (6) motion to dismiss.

**OVERVIEW:** The carrier sought dismissal of the reseller's claims on the ground that they were pre-empted by the Federal Communications Act (Act), <u>47 U.S.C.S. §§ 151</u>-613. In the alternative, the carrier sought to have the case referred to the Federal Communications Commission under the doctrine of primary jurisdiction. Finally, the carrier challenged the reseller's standing to bring its consumer fraud claim, arguing that the Illinois Consumer Fraud Act (Fraud Act) was never designed to reach the type of "purely private wrong" the reseller sought to redress. The court found that allowing the reseller to recover damages it suffered as a result of the carrier's fraudulent marketing strategies did not conflict or interfere with the Act's provisions or policies. However, the court held that the reseller's breach of contract claim, through which it sought to secure benefits unavailable to other customers of the carrier, was pre-empted by the Act. The proper resolution of the Fraud Act claim required no specialized expertise, and thus the primary jurisdiction doctrine did not apply. Finally, the reseller was not required to prove a pattern of deceptive acts affecting consumers generally.

**OUTCOME:** The court granted the carrier's motion to dismiss with regard to the seller's breach of contract claim. The court denied the carrier's motion to dismiss with regard to the Fraud Act claim. The court denied the motion to dismiss that sought dismissal under the doctrine of primary jurisdiction. The court ordered the scheduling of a settlement conference.

**CORE TERMS:** customer, Communications Act, tariff, cellular, pre-empted, motion to dismiss, carrier, consumer fraud, promotion, Illinois Consumer Fraud Act, federal law, primary jurisdiction, telephone, state law, interfere, data base, telecommunication, consumer, specialized knowledge, federal common law, telephone service, false advertising, regulatory scheme, common law, regulation, marketing, station, duties, breach of contract, savings clause

# **CORE CONCEPTS** • Hide.Concepts

Civil Procedure: Pleading & Practice: Defenses, Objections & Demurrers: Failure to State a Cause of Action

★The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. When ruling on a motion to dismiss, the court will take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiffs. A complaint should not be dismissed if relief is possible under any set of facts that could be established consistent with the allegations.

Communications Law: Federal Acts: Communications Act

★The Federal Communications Act, 47 U.S.C.S. §§ 151-613 requires carriers to provide telephone service when presented with a reasonable request. 47 U.S.C.S. § 201(a). Carriers must also file tariffs containing a charge schedule and any classifications, regulations, or practices affecting charges. 47 U.S.C.S. §§ 203(a),(c). The rates must be reasonable, and carriers cannot engage in unreasonable or discriminatory practices. 47 U.S.C.S. §§ 201(b), 202(a), 202(c).

# Constitutional Law: Supremacy Clause

★ Congressional purpose is "the ultimate touchstone" in any federal pre-emption analysis. In cases where Congress has not explicitly stated its intention to supersede state law, the court looks to the structure and purpose of the statute. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it.

# Communications Law: Federal Acts: Communications Act

★ Applied properly, the savings clause in the Federal Communications Act (Communications Act), specifically 47 U.S.C.S. § 414, harmonizes Congress' obvious desire to preserve certain state court claims with its clear purpose in enacting the Communications Act of ensuring reasonable, non-discriminatory telecommunications service for all Americans.

# Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue

♣Under the doctrine of primary jurisdiction, courts may refer matters within the special expertise of an administrative agency to that body for its review. Cases that require a specialized knowledge of specific economic or technical or uniformity in outcome are often the best candidates for referral under the primary jurisdiction doctrine.

# Antitrust & Trade Law: Consumer Protection

Evidence: Procedural Considerations: Burdens of Proof, Presumptions & Inferences

★Under the Illinois Consumer Fraud Act, plaintiffs no longer need to prove a pattern of deceptive acts affecting consumers generally.

**COUNSEL:** [\*1] For CELLULAR DYNAMICS, INC., an Illinois corporation, plaintiff: Nathan H. Dardick, Arnold A. Pagniucci, Michael David Richman, Sachnoff & Weaver, Ltd., Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation, defendant: Brian W. Lewis, Lauren Smith Tashma, Wildman, Harrold, Allen & Dixon, Chicago, Il. Robin L Redfield, MCI Telecommunications Corporation, Washington, D.C.

JUDGES: Ann Claire Williams, Judge, United States District Court

**OPINIONBY:** Ann Claire Williams

#### OPINION: MEMORANDUM OPINION AND ORDER

On May 19, 1994, Cellular Dynamics, Inc., an Illinois based reseller of cellular telephone services, brought suit against MCI Telecommunications Corp. ("MCI"), a carrier of long distance telephone services, for damages following MCI's cancellation of the planned transfer of Cellular Dynamics' more than 5,300 customers to MCI. Cellular Dynamic alleges breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (1993). MCI has moved to dismiss both counts pursuant to Fed. Rule Civ. P. 12(b)(6). For the reasons stated below, the motion is granted in part and denied in part.

Background n l
n I For purposes of this motion to dismiss, the court accepts all of the facts alleged in Cellular's complaint as true. Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992).

As a reseller of cellular services, **[\*2]** Cellular Dynamics purchases cellular air-time from cellular providers and resells that time to consumers at retail. (Compl, P 6). As of January 1994, Cellular Dynamics had at least 5,300 cellular customer lines. (**Id.**).

In December 1993, Greg Chatfield, an MCI sales representative, first contacted Cellular Dynamics' President, Steven DeMar, regarding the transfer of Cellular Dynamics' long distance cellular business to MCI. As Chatfield explained to DeMar, Cellular Dynamics would receive \$ 50 from MCI for each cellular customer line that Cellular Dynamics could transfer to MCI. (Complaint, P 9). Chatfield and his supervisor, Dayle Thomas, later confirmed these terms in a brief memo they sent to DeMar the following month. (Id.).

On January 26, 1994, DeMar responded. DeMar wrote a letter to Chatfield explaining that he was interested in transferring his customer base to MCI, but had certain conditions that first needed to be met:

Just to reiterate Cellular Dynamics [sic] position. We are willing to move our long distance business to M.C.I. given the following representations we have received from M.C.I.

- 1) A magnetic billing tape sent to our billing vendor.
- 2) **[\*3]** A direct response check for \$ 50 per customer, sent to Cellular Dynamics upon changing service.
- 3) MCI Preferred Benefits...
- 4) Pic fee switching credit of \$ 5.00 per line.
- 5) M.C.I. lifetime satisfaction guarantee.

If this is what you can deliver...Lets [sic] do business.

(Compl., P 10). Along with the letter, DeMar sent Chatfield a one-page print out from a 200-page customer data base of its cellular customer list, purportedly as an example of the information that would be provided in exchange for the conditions outlined above. (Id.).

The next day, DeMar telephoned Chatfield to confirm that the conditions were acceptable. Chatfield assured him that they were. The bargain was struck. (Compl., P 11). DeMar immediately sent MCI all 200 pages of Cellular Dynamics' data base, containing all of the information MCI needed to effect the transfer. (Id., P 12). After receiving the materials, Chatfield telephoned DeMar to let him know that the 200-page data base was satisfactory. (Id., P 14).

A few weeks later, MCI decided not to pay Cellular Dynamics the promised \$ 50 per line, and attempted to cancel the deal. After its demands that MCI comply **[\*4]** with the terms of the parties' agreement were rebuffed, Cellular Dynamics filed this suit seeking \$ 265,000 in damages.

#### Standard of Review

♣The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Triad Assocs. v. Chicago Housing Authority, 892 F.2d 583, 586 (7th Cir. 1989). Thus, when ruling on a motion to dismiss, the court will "take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiff[s]." Ellsworth v. City of Racine. 774 F.2d 182, 184 (7th Cir. 1985). A complaint should not be dismissed "if relief is possible under any set of facts that could be established consistent with the allegations." Bartholet, 953 F.2d at 1078.

#### **Discussion**

#### I. Preemption

Defendant MCI moves to dismiss Cellular Dynamics' claims on the ground that they are preempted by the Federal Communications Act (the "Communications Act"), 47 U.S.C. §§ 151-613 (1991& Supp. 1994). Passed in 1934, at a time when AT&T held a virtual monopoly over the nation's telephone service, the Communications Act was expressly enacted [\*5] to "make available, as far as possible, to all the people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communications service with adequate facilities at reasonable charges..." 47 U.S.C. § 151. The Act requires carriers to provide telephone service when presented with a reasonable request. 47 U.S.C. § 201(a). Carriers must also file tariffs containing a charge schedule and any classifications, regulations, or practices affecting charges. §§ 203(a),(c). The rates must be reasonable, and carriers cannot engage in unreasonable or discriminatory practices. §§ 201(b), 202(a), 202(c).

+Congressional purpose is "the ultimate touchstone" in any federal pre-emption analysis. Cipollone v. Liquett Group, Inc., 120 L. Ed. 2d 407, 112 S. Ct. 2608, 2617 (1992). In cases like this one, where Congress has not explicitly stated its intention to supersede state law, the court looks to the structure and purpose of the statute. Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law [\*6] so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Cipollone, 112 S. Ct. at 2617.

This case is not the first time a court has been asked to examine the pre-emptive reach of the Communications Act. In Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968), one of the first cases to address the issue, the Second Circuit held that federal common law emanating from the Act pre-empted plaintiffs state law negligence and contract law claims. Plaintiff, a radio broadcasting station operator, had sought to hold AT&T liable for the negligent installation and operation of telephone lines over which its stations' broadcasts were transmitted. Id. at 488. After noting the broad scope and comprehensive nature of the Communication Act, the court found that Congress intended to preempt the entire field:

Questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area. Where neither [\*7] the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law.

Id. at 491.

**As** numerous courts have since noted, the Ivy court failed to discuss the Communications Act's "savings clause" which provides:

# § 414 Exclusiveness of Chapter

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. Courts to address this issue since Ivy have generally held that Congress' decision to include a savings clause in the Act evidences its desire to preserve those state court claims for breaches of independent duties that neither conflict with specific provisions of the Act, nor interfere with its regulatory scheme. See Bruss Co. v. Allnet Communication Services, Inc., 606 F. Supp. 401, 410-11 (N.D. Ili, 19851 (preserving plaintiffs Illinois common law and statutory fraud claims); Kellerman v. MCI Telecommunications Corp., 112 Ill. 2d 428, 493 N.E.2d 1045, 1051, 98 Ill. Dec. 24 (Ill. 1986) (fraud claims [\*8] arising out of defendant's allegedly false advertising practices not pre-ernpted); American Inmate Phone Systems, Inc. v. US Sprint Communications Co., 787 F. Supp. 852, 856-59 (N.D. III. 1992) (contract and consumer fraud claims preserved); Cooperative Communications v. AT&T Corp., 867 F. Supp. 1511, 1515-17 (D. Utah 1994) (intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition). \*Applied properly, this rule harmonizes Congress' obvious desire to preserve certain state court claims with its clear purpose in enacting the Communications Act of ensuring reasonable, non-discriminatory telecommunications service for all Americans. Persuaded by the balanced rationale set forth in these post-Ivy cases, the court rejects defendant's suggestion that Congress has preempted all state claims affecting telecommunication services, and will instead examine each of Cellular Dynamics' claims individually to determine whether the requested relief conflicts with any specific provisions of the Act or interferes with its regulatory scheme.

The court has little [\*9] trouble finding that plaintiff's consumer fraud claim is not preempted by the Communications Act. Like the false advertising practices challenged in Kellerman and Bruss, supra, the wrong complained of here does not implicate MCI's rates or service, but rather the manner in which MCI markets its services. As broad as it is, the Communications Act does not purport to regulate specific sales strategies and marketing devices employed by telecommunication carriers. As noted above, the Communications Act is primarily concerned with the quality, price, and availability of the underlying service. Because allowing Cellular Dynamics to recover damages for any injuries it suffered as a result of MCl's allegedly fraudulent marketing strategies neither conflicts nor interferes with any provision, regulation, or policy underlying the Act, the court finds that plaintiffs consumer fraud claim is not pre-empted.

Cellular Dynamics' breach of contract claim raises different concerns. As defendant MCI notes in its reply brief, MCI's tariff on file with the Federal Communications Commission ("FCC") specifically addresses, and critically, limits, promotions similar to the one MCI offered plaintiff. [\*10] n2 Section C.10(c) of the tariff states:

From time to time, MCI will offer one or more of the Following promotions to customers responding to media advertising, direct mail materials, telemarketing promotions and/or personal sales presentations, which offer such promotions.... The benefits will be provided . . . (2) by issuing to the customer a check, coupon, or certificate redeemable by, or payable to, the customer, MCI, or a cooperating LEC or other promotional benefit including goods or services delivered to the Subscriber or coupons, upgrades or discounts on goods or any award under this promotion shall not exceed one full month's usage (including monthly recurring charges) charges and access charge or its equivalent . . . or \$ 300.00, whichever is greater.

(MCI Tariff F.C.C. No. 1, § C.10(C). This information was properly included in MCI's tariff under section 203 of the Communications Act as a practice affecting the rates for its service
n2 The court takes judicial notice of the tariff as a matter of public record. See <u>United State v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991);</u> Charles A. Wright & Arthur R. Miller, Federa Practice and Procedure, § 1357 (1990).
[*11]

In seeking expectation damages, as opposed to consequential damages, for MCl's breach of the contract, plaintiff, in effect, seeks the benefits of a bargain that is not available to the public at large under MCl's tariff. Yet, as courts have held again and again, a regulated carrier's actual rates and related practices must be consistent with the tariff rates and practices established with the appropriate regulatory agency, even if it has quoted or charged a lower rate to its customer. See Marco Supply Co. v. AT & T Communications, Inc. 875 F.2d 434, 436 (4th Cir. 1989); MCI Telecommunications Corp. v. Garden State Inv. Corp., 981 F.2d 385, 387-388 (8th Cir. 1992); Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 59 L. Ed. 853, 35 S. Ct. 494 (1915). To permit otherwise would allow carriers to discriminate among customers, and frustrate one of the central purposes of the Communications Act generally and section 203 in particular. Accordingly, the court holds that Cellular Dynamics' contract claim, through which it seeks to secure benefits unavailable to other MCl customers under the tariff, is pre-empted by federal law. MCl's motion to dismiss this claim is granted. [\*12]

#### II. Primary Jurisdiction

In the alternative, MCI seeks to have this case referred to the FCC under the doctrine of primary jurisdiction. Funder this doctrine, courts may refer matters within the special expertise of an administrative agency to that body for its review. United States v. Western P. R. Co., 352 U.S. 59, 63-64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). Cases that require a specialized knowledge of specific economic or technical or uniformity in outcome are often the best candidates for referral under the primary jurisdiction doctrine. Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976). In the case at hand, the only remaining claim arises under the Illinois Consumer Fraud Act. The proper resolution of this claim requires no specialized knowledge of the telecommunications industry nor any administrative expertise. MCI's motion to dismiss under the doctrine of primary jurisdiction is therefore denied.

# IV. Standing under the Illinois Consumer Fraud Act

Finally, MCI challenges Cellular Dynamics' standing to bring its consumer fraud claim, that the Illinois Consumer Fraud Act was never designed to reach the type [\*13] of "purely private wrong" plaintiff seeks to redress here. Despite its intuitive appeal, defendant's argument simply does not hold up under the most recent Illinois case law interpreting the statute.

As defendant recognizes, the Illinois legislature recently clarified the broad scope of the Illinois Consumer Fraud Act, adding a provision stating that: "Proof of a public injury, a pattern or an effect on consumers generally shall not be required." 715 ILCS 505/10(a). Under recent Illinois case law interpreting the \*Act, plaintiffs no longer need to prove a pattern of deceptive acts affecting consumers generally. See Breckenridge v. Cambridge Homes, 246 Ill. ADD. 3d 810, 616 N.E.2d 615, 622-23, 186 Ill. Dec. 425 (Ill. ADD. 1993); Rubin v. Marshall Field & Co., 232 Ill. App. 3d 522, 597 N.E.2d 688, 694, 173 Ill. Dec. 714 (Ill. App. 1992). "A single deceptive act is sufficient to support recovery under the Act." Breckenridge, 616 N.E.2d at 623. Thus, plaintiffs failure to allege a public wrong is not fatal to its claim. MCI's motion to dismiss Cellular Dynamics' consumer fraud claim for lack of standing is denied.

# Conclusion

For the foregoing reasons, MCI's motion [\*14] to dismiss is granted with respect to Count I and denied with respect to Count II. A settlement conference will be scheduled in this case with the entry of this order. The parties shall fully explore the settlement of this case well before the scheduled conference.

#### **ENTER:**

Ann Claire Williams, Judge

**United States District Court** 

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# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS CHAPTER 5. WIRE OR RADIO COMMUNICATION COMMON CARRIERS DEVELOPMENT OF COMPETITIVE MARKETS



### • GO TO COPE ARCHIVE DIRECTORY FOR THIS JURISDICTION

47 USCS § 251 (2002)

#### § 251. Interconnection

- (a) General duty of telecommunications carriers. Each telecommunications carrier has the duty--
- (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
- (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 [47 USCS § 255 or 256].
- (b) Obligations of ail local exchange carriers. Each local exchange carrier has the following duties:
- (1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.
- (2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.
- (3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.
- (4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [47\_USCS § 224].
- (5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.
- (c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
- (1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 [47 USCS § 252] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.
- (2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
  - (A) for the transmission and routing of telephone exchange service and exchange access;
  - (B) at any technically Feasible point within the carrier's network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
- (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [47 USCS § 252].
- (3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network

elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [47 USCS § 252]. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

- (4) Resale. The duty--
- (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
- (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.
- (5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.
- (6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

# (d) Implementation.

- (1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 19961, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.
- (2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether--
  - (A) access to such network elements as are proprietary in nature is necessary; and
- (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.
- (3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
  - (A) establishes access and interconnection obligations of local exchange carriers;
  - (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section the purposes of this part [47 USCS §§ 251 et seq.].

# (e) Numbering administration.

- (1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.
- (2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.
- (3) Universal emergency telephone number. The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an

emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999 [enacted Oct. 26, 1999].

- (f) Exemptions, suspensions, and modifications.
  - (1) Exemption for certain rural telephone companies.
- (A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [47 USCS § 254] (other than subsections (b)(7) and (c)(1)(D) thereof).
- (B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [47 USCS § 254] (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.
- (C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 19961.
- (2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--
  - (A) is necessary--
- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
  - (ii) to avoid imposing a requirement that is unduly economically burdensome; or
  - (iii) to avoid imposing a requirement that is technically infeasible; and
  - (B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 19961, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of

enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 19961 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

- (h) Definition of incumbent local exchange carrier.
- (1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--
- (A) on the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 19961, provided telephone exchange service in such area; and
- (B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601 (b)); or
- (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).
- (2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--
- (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.
- (i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 [47 USCS § 201].